

**POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

PUGET SOUNDKEEPER ALLIANCE,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent,

And

SNOHOMISH COUNTY, CITY OF
SEATTLE, CITY OF TACOMA, PIERCE
COUNTY, CITY OF BELLEVUE, and
KING COUNTY,

Intervenor-
Respondents.

PCHB No. 19-043c

ORDER ON CROSS MOTIONS RE:
2019 PHASE I AND WESTERN
WASHINGTON PHASE II MUNICIPAL
STORMWATER PERMITS AND
ORDER ON MOTION TO STRIKE

I. INTRODUCTION

These consolidated appeals involve challenges to permits issued by the Department of Ecology (Ecology) to regulate stormwater discharges from municipal storm sewer systems under the National Pollutant Discharge Elimination System and State Waste Discharge General Permits. The permits at issue are the Phase I Municipal Stormwater Permit (Phase I Permit) and the Western Washington Phase II Stormwater Permit (Phase II Permit). The Eastern Washington

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Phase II Municipal Stormwater Permit is not at issue. Phase I and Phase II Permits will be referred to collectively as the Permits. Ecology issued the Permits on July 1, 2019.

The Pollution Control Hearings Board (Board) deciding this matter was comprised of Carolina Sun-Widrow, presiding Board Member, Board Chair Neil L. Wise, and Board Member Michelle Gonzalez. The following attorneys represented the parties and Intervenor- Respondents at one point or another during the proceedings in this appeal:

Puget Soundkeeper Alliance	Attorneys Janette K. Brimmer, Ashley Bennett, Earthjustice
Ecology	Thomas J. Young, Senior Counsel; Phyllis J. Barney, Assistant Attorney General
Intervenor-Respondents	
Snohomish County	Alethea Hart, Jessica Kraft-Klehm, Deputy Prosecuting Attorneys
City of Seattle	Theresa R. Wagner, Sr. Assistant City Attorney
City of Tacoma and Pierce County	Attorneys Lori A. Terry, Devra R. Cohen, Kelly A. Mennemeier, Foster Garvey PC
City of Bellevue	Attorney Stephen J. Tan, Cascadia Law Group PLLC, Kathryn L. Gerla, City Attorney, Catherine A. Drews, Assistant City Attorney
King County	Mark Stockdale, Sr., Deputy Prosecuting Attorney, Kimberly Y. Frederick and Kristie Elliott, Deputy Prosecuting Attorneys

II. PROCEDURAL HISTORY

On July 29, 2019, Washington Association of Sewer and Water Districts (WASWD) filed an appeal challenging the Phase I and Phase II Permits. WASWD's appeal was assigned case number PCHB No. 19-043.

Puget Soundkeeper Alliance (Soundkeeper) filed two appeals with the Board on July 31, 2019, challenging the Permits. Soundkeeper's appeals were assigned case numbers PCHB No. 19-045 and PCHB No. 19-046. The three appeals were consolidated for hearing as PCHB No. 19-043c.

Several cities and counties (Intervenor-Respondents) moved for and obtained orders granting their petitions to intervene in the three appeals. The parties also obtained a continuance of the 12-day hearing to October 2020. *See Amended Consolidation and Prehearing Order at 2-5 (Nov. 22, 2019).*

At the parties' and Intervenor-Respondents' request, the Board further postponed the hearing to May 2021 and adjusted associated case deadlines in order to adapt to circumstances brought on by the onset of the coronavirus (COVID-19) pandemic. *See Third Amended Consolidation and Prehearing Order (March 27, 2020).*

The Board also granted various parties' requests to extend case preparation deadlines and to continue the hearing in order to pursue settlement negotiations. *See, Order on Stipulation to Extend Expert Disclosure and Completion of Discovery and Dispositive Motion Filing Deadline (Oct. 13, 2020); Order Granting Parties' Joint Motion to Continue (March 11, 2021).*

1 The parties settled many issues as the appeal and summary judgment briefing progressed,
2 with the Board dismissing WASWD's appeal and legal issues associated with WASWD's
3 appeal, as well as Legal Issues 10, 11, 16, 17, 20, and 21, associated with Soundkeeper's appeal.
4 *See Order Dismissing Washington Association of Sewer and Water Districts' Appeal (February*
5 *2, 2021); Fourth Amended Consolidation and Prehearing Order at 4-5 (March 11, 2021); Order*
6 *Dismissing Legal Issues 10, 11, 16, and 17 (Sept. 16, 2021); Order on Joint Motion for*
7 *Dismissal of Remaining Issues 20 and 21 (Jan. 19, 2022).* Through the settlement efforts, the
8 resources and time of all involved were conserved during a period of adapting to telework.

9 Now before the Board are Soundkeeper's motion for partial summary judgment, and
10 Ecology's and Intervenor-Respondents' motions for summary judgment. Ecology's and
11 Intervenor-Respondents' motions seek dismissal of all remaining legal issues governing the
12 appeal. The details of the respective motions will be discussed below. Also before the Board is
13 Intervenor-Respondents' Motion to Strike Improper Opinion Testimony in Declarations
14 Submitted in Support of [Soundkeeper's] Motion for Summary Judgment.

15 The following remaining issues are the subject of this order:

16 12. Does the Phase I Permit's failure to require any implementation of projects
17 identified through basin-level planning unlawfully cause or contribute to
violations of water quality standards?

18 13. Does the Phase I Permit's failure to require any implementation of projects
19 identified through basin-level planning unlawfully allow the discharge pollutants
20 that have not been treated with AKART and/or fail to reduce the discharge of
pollutants to the MEP?

21 14. Does the Phase I Permit's Condition S.4 fail to require sufficiently stringent
adaptive management measures to ensure the permit does not cause or contribute
to violations of water quality standards?

1 15. Do the adaptive management provisions of the Phase I Permit's Condition S.4
2 allow the discharge of pollutants that have not been treated with AKART and/or
that fail to reduce the discharge of pollutants to the MEP?

3 18. Does the Phase II Permit's Condition S.4 fail to require sufficiently stringent
4 adaptive management measures to ensure the permit does not cause or contribute
to violations of water quality standards?

5 19. Do the adaptive management provisions of the Phase II Permit's Condition
6 S.4 allow the discharge of pollutants that have not been treated with AKART
and/or that fail to reduce the discharge of pollutants to the MEP?

7 In ruling on the motions, the Board considered the following:

- 8 1. Puget Soundkeeper Alliance Motion for Summary Judgment on Issue Nos. 11, 14, 17,
9 and 20 and Memorandum (Soundkeeper Mot. for Summ. J.);
- 10 2. Declaration of Chris Wilke (Wilkie Decl.);
- 11 3. Declaration of Janette K. Brimmer, with exhibits A-F (Brimmer Decl.);
- 12 4. Declaration of Vicky Gannon (Gannon Decl.);
- 13 5. Declaration of Walter S. Tabler (Tabler Decl.);
- 14 6. Respondent Department of Ecology's Response in Opposition to Puget Soundkeeper
15 Alliance's Motion for Summary Judgment on Issues Nos. 11, 14, 17, and 18 and Cross-
16 Motion on Issues 10-21;
- 17 7. Declaration of Phyllis Barney in Support of Ecology's Cross-Motion for Summary
18 Judgment on Issues 10-21, with exhibits A-D (Barney Decl.);
- 19 8. Declaration of Karen Dinicola in Support of Ecology's Cross-Motion on Issues 10-21
20 (Dinicola Decl.);

- 1 9. Declaration of Jeff Killelea in Support of Ecology's Response in Opposition to Puget
- 2 Soundkeeper Alliance's Motion for Summary Judgment (Killelea Decl.);
- 3 10. Intervenor-Respondents' Response in Opposition to Puget Soundkeeper Alliance's
- 4 Motion for Partial Summary Judgment and Intervenor-Respondents' Cross-Motion for
- 5 Summary Judgment on Issues 10-21 with the following supporting declarations and
- 6 exhibits;
- 7 11. Declaration of Don P. McQuilliams, with exhibits A-B (McQuilliams Decl.);
- 8 12. Declaration of Douglas J. Durbin, Ph.D., with exhibits A-D (Durbin Decl.);
- 9 13. Declaration of Douglas Navetski, with exhibits A-B (Navetski Decl.);
- 10 14. Declaration of Geoffrey M. Smyth, with exhibit A (Smyth Decl.);
- 11 15. Declaration of Karen Kerwin, with exhibits A-C (Kerwin Decl.);
- 12 16. Declaration of Lori A. Terry, with exhibits A-H (Terry Decl.);
- 13 17. Declaration of Maureen Meehan, with exhibits A-B (Meehan Decl.);
- 14 18. Declaration of Scott Smith, with exhibits (Smith Decl.);
- 15 19. Declaration of Kevin Buckley in Support of Ecology's and Intervenor-Respondents'
- 16 Response in Opposition to Puget Soundkeeper Alliance's Motion for Partial Summary
- 17 Judgment and Ecology's and Intervenor-Respondents' Cross-Motion for Summary
- 18 Judgment (Buckley Decl.);
- 19 20. Puget Soundkeeper Alliance's Combined Response/Reply on Motions for Summary
- 20 Judgment (Soundkeeper Combined Response/Reply);
- 21

- 1 21. Second Declaration of Janette K. Brimmer in Support of and in Response to Motions for
2 Summary Judgment, with exhibits G-K (Second Brimmer Decl.);
- 3 22. Respondent Department of Ecology's Reply in Support of Cross-Motion for Summary
4 Judgment;
- 5 23. Second Declaration of Phyllis Barney in Support of Ecology's Cross-Motion for
6 Summary Judgment on Issues 12, 13, 20, and 21, with exhibits A-F; (Second Barney
7 Decl.)
- 8 24. Intervenor-Respondents' Reply in Support of Intervenor-Respondents' Cross-Motion for
9 Summary Judgment on Issues 12-15, 18-21;
- 10 25. Declaration of Stephen J. Tan in Support of Intervenor-Respondents' Reply in Support of
11 Intervenor-Respondents' Cross Motion for Summary Judgment on Issues 12-15, 18-21,
12 with exhibit A (Tan Decl.);
- 13 26. Intervenor-Respondents' Motion to Strike Improper Opinion Testimony in Declarations
14 Submitted in Support of [Soundkeeper's] Motion for Summary Judgment;
- 15 27. [Soundkeeper's] Response in Opposition to Intervenor-Respondents' Motion to Strike
16 (Soundkeeper's Response in Opp'n to Mot. to Strike);
- 17 28. Intervenor-Respondents' Reply in Support of their Motion to Strike Improper Testimony
18 in Declarations Submitted in Support of [Soundkeeper's] Motion for Summary Judgment
19 (Intervenor-Respondents' Reply in Support of Mot. to Strike); and
- 20 29. The Board's case file in *Puget Soundkeeper Alliance v. Dep't of Ecology*, PCHB No. 19-
21 043c.

1 Based on the evidence submitted and the foregoing pleadings, the Board enters the
2 following decision.

3 III. GENERAL BACKGROUND

4 A. Stormwater Problem

5 The Permits at issue control stormwater pollutant discharges. Stormwater is runoff from
6 rain and snowmelt that drains over surfaces, collecting pollutants along the way, before passing
7 through municipal separate storm sewer systems (MS4). MS4s are the conveyances, or system
8 of conveyances, including roads with drainage systems, municipal streets, catch basins, curbs,
9 gutters, ditches, manmade channels or storm drains, owned or operated by municipalities, that
10 are designed or used for collecting or conveying stormwater. MS4s do not, by definition, include
11 sewers that collect and convey sewage and stormwater. *Puget Soundkeeper Alliance v. Dep't of*
12 *Ecology*, PCHB Nos. 07-021, 07-026 – 030, and 07-037, p. 10 (Order on Dispositive Motions
13 Condition S4, Apr. 2, 2008) (2008 SJ Order Condition S4).

14 Stormwater is a primary source of pollutants to urban waterways and Puget Sound,
15 including lead, zinc, copper, cadmium, bacteria, oil, grease, sediments, nutrients, heat, and
16 oxygen-demanding organics. *Brimmer Decl., Ex. F, pp. 15-17; 2008 SJ Order Condition S4, pp.*
17 *11-12*. Municipal stormwater has many impacts on human health and the natural environment.
18 Untreated and unmanaged stormwater could contaminate aquifers that are a source of drinking
19 water, close shellfish harvests, erode stream channels and damage spawning beds, and harm
20 benthic insects, salmon embryos and spawning adult salmon. *Id.*; *Brimmer Decl., Ex. F, pp. 13-*
21 *15*. Relevant here, studies investigating the phenomena of pre-spawn salmon mortality have

1 found that stormwater pollution is a likely cause. In particular, scientists are homing in on a
2 ubiquitous chemical associated with tire degradation. The substance – “6PPD” – is contained
3 in particles worn from tires and degrades to form 6PPD-quinone, which can be carried by
4 stormwater to surface waters. Recent published research shows 6PPD-quinone is highly toxic to
5 coho salmon at low concentrations. *Terry Decl., Ex. E, p. 15; Durbin Decl., ¶¶ 50-52.* There are
6 no numeric water quality criteria for 6PPD-quinone. *Id.*, ¶ 53.

7 However, stormwater in general is difficult to manage because the discharges are highly
8 variable in frequency, volume, duration, and pollutant concentration due to the vagaries of
9 rainfall and snowmelt. *2008 SJ Order Condition S4, p. 10. Durbin Decl., ¶¶ 15, 18, 31.*

10 Municipal stormwater is also different from other stormwater discharges, such as
11 industrial stormwater. Municipal stormwater is even more difficult to manage than other types
12 of stormwater because it is discharged from such a large number of outfalls, and the entire
13 conveyance systems collecting runoff consists of hundreds or thousands of highway miles,
14 drainage pipes, and ditches. *See, e.g., McQuilliams Decl., ¶¶ 5-7, Exs. A-B; Kerwin Decl., ¶¶*
15 *10-11, Exs. B-C; Durbin Decl., ¶¶ 20-29; 2008 SJ Order Condition S4, p. 10-11.* Compounding
16 the difficulty is the fact that most existing MS4s were not built with water quality protection in
17 mind, but built to drain water as efficiently as possible, managing peak flows, and protecting the
18 public from flooding and disease. *Id.; Kerwin Decl., ¶ 11.* Finally, unlike other stormwater
19 discharges generated from a single or a few discrete sources controlled by the owner/operator of
20 a facility, the nature of the pollution generating activity is different for municipal stormwater.
21 Municipalities are not the primary generators of pollutants entering their MS4s; instead, the

1 source of the pollutants are mostly lawful daily activities of the citizens and businesses on public
2 and private lands, such as driving cars. *2008 SJ Order Condition S4, p. 11; Kerwin Decl., ¶ 11-*
3 *12; Meehan Decl., ¶ 10; Navetski Decl., ¶¶ 6-7, 10.* Moreover, municipalities have limited
4 control over the vast majority of sources that may contribute pollutants to its MS4s and to
5 receiving waters. *2008 SJ Order Condition S4, p. 11; Kerwin Decl., ¶ 12; Buckley Decl., ¶ 8.*

6 **B. Regulating Municipal Stormwater**

7 The Clean Water Act (CWA) was enacted to “restore and maintain the chemical,
8 physical, and biological integrity of the Nation's waters.” 33 U.S.C. § 1251(a). To achieve that
9 purpose, the CWA prohibits the discharge of pollutants from a point source without a National
10 Pollutant Discharge Elimination System (NPDES) permit. *Id.* §§ 1311(a), 1342(a). Large and
11 medium MS4s are ““point source[s]”” and therefore require an NPDES permit. *Id.* § 1362(14);
12 *Snohomish County v. Pollution Control Hr'gs Bd.*, 187 Wn.2d 346, 351-52, 386 P.3d 1064
13 (2016).

14 Congress authorized the Environmental Protection Agency (EPA) to delegate the
15 NPDES permitting program to the states. *Id.* § 1342(b). The EPA delegated authority to
16 Ecology to implement the NPDES permitting program in Washington. *See* 39 Fed. Reg. 26,061
17 (July 16, 1974); RCW 90.48.260(1). The legislature has recognized that Ecology has
18 “[c]omplete authority to establish and administer” the program. *Snohomish County*, 187 Wn.2d
19 at 352 (citing RCW 90.48.260(1)(a)).

20 The Phase I and Phase II Permits here are both NPDES permits (as required by the CWA)
21 and State Waste Discharge Permits issued pursuant to the Washington State Water Pollution

1 Control Act (WPCA), chapter 90.48 RCW. *Terry Decl., Exs. A, C.* The Permits are general
2 permits, which provide an alternative to individual NPDES discharge permits. General permits
3 allow regulators to efficiently administer a permit process covering multiple discharges of a
4 point source category within a designated geographical area. *2008 SJ Order Condition S4, p. 12;*
5 *WAC 173-226-050.* Both Phase I and Phase II Permits authorize the discharge of stormwater to
6 surface and ground waters of the state from MS4s owned by each permittee, subject to
7 compliance with the Permits' terms and conditions. The Phase I Permit covers discharges from
8 large and medium sized MS4s statewide. *Terry Decl., Ex. A, p. 1.* The Phase II Permit applies to
9 owners and operators of regulated small MS4s located in western Washington. *Terry Decl., Ex.*
10 *C, p. 1.* The permittees under the Permits are municipalities and entities that own and operate the
11 MS4s.

12 The Permits issued by Ecology must comply with the federal CWA standard and the state
13 standard under the WPCA. 33 U.S.C. § 1342(p)(3)(B)(iii); *Snohomish County*, 187 Wn.2d at
14 352. The federal standard provides that “[p]ermits for discharges from municipal storm sewers
15 ... shall require controls to reduce the discharge of pollutants to the maximum extent practicable
16 [(MEP)].” 33 U.S.C. § 1342(p)(3)(B)(iii). The state standard provides that Ecology “shall ...
17 incorporate permit conditions which require all known, available, and reasonable [treatment]
18 methods to control toxicants [(AKART)].” RCW 90.48.520.

19 Ecology issued the first iteration of the municipal storm water permits in 1995, the
20 second in 2007, and the third in 2013. The Permits at issue represent the fourth iteration. The
21 issues presented in this appeal should be analyzed in light of the Board's decisions in previous

1 appeals of the 2007 and 2013 permits. *City of Woodinville v. Dep't of Ecology*, PCHB No. 15-
2 013, p.3 (Apr. 22, 2016).

3 Municipal stormwater permits are “programmatic permit[s]” that differ from other
4 NPDES permits. Instead of establishing benchmarks or effluent limitations for point source
5 discharges, they require permittees to implement area-wide stormwater management programs
6 with various elements. *Pierce County v. Dep't of Ecology*, PCHB Nos. 12-093c, 12-097c, pp.
7 12-13 (Findings of Fact, Conclusions of Law, and Order, March 21, 2014) (2013 Permits Final
8 Order); *Killelea Decl.*, ¶ 3; *Durbin Decl.*, ¶¶ 37-38. A programmatic approach allows for
9 flexibility to address water quality issues within the context of a general permit and accounts for
10 the numerous differing conditions faced by the many different Phase I and Phase II permittees.
11 *See, Puget Soundkeeper Alliance v. Dep't of Ecology*, PCHB Nos. 07-021, 07-026 – 030, and 07-
12 037, p. 9, FF 5 (Findings of Fact, Conclusions of Law and Order Condition S4, Aug. 7, 2008)
13 (2008 Final Order Condition S4).

14 IV. ANALYSIS

15 A. Motion to Strike

16 Intervenor-Respondents move the Board to strike or disregard portions of three
17 declarations submitted in support of Soundkeeper’s motion for partial summary judgment. They
18 contend that the declarations consist of improper opinion testimony by lay witnesses or
19 otherwise inadmissible testimony and is not the “best evidence reasonably obtainable” on issues
20
21

1 of water quality, salmon pre-spawn mortality, the effects of stormwater pollution and stormwater
2 discharges by municipal permittees on pre-spawn mortality, and the efficacy of the Permits.¹

3 Soundkeeper is a nonprofit organization with over 1,500 members whose mission is to
4 protect and preserve the waters of Puget Sound and the species that live there. *Tabler Decl.*, ¶ 3.
5 The declarations at issue are from current Soundkeeper members Walter Tabler, Vicky Gannon,
6 and Chris Wilke. They all live and recreate in or near Puget Sound, and their declarations
7 contain testimony on issues described above as well as how those issues harm their individual
8 interests in Puget Sound. *See, Tabler Decl.; Gannon Decl., Wilke Decl.*

9 Soundkeeper responds, with citation to federal case law, that the declarations are properly
10 submitted to demonstrate its organizational standing in appealing the Permits. Soundkeeper
11 wishes to demonstrate standing before the Board in the event the case is appealed, and prevent a
12 claim that Soundkeeper did not timely submit declarations demonstrating standing. Soundkeeper
13 further responds that it “plainly does not rely on any statement in any of the member declarations
14 to support any argument on the merits” of the summary judgment motion, and is not proffering
15 any declaration as “expert” testimony on any topic. *Puget Soundkeeper Response in Opp’n to*
16 *Mot. to Strike at 2, n. 1, 3.* Reviewing the declarations and Soundkeeper’s motion, the Board
17 agrees that the declarations are submitted for the permissible purpose of demonstrating standing,

18
19
20 ¹ The Board’s practice and procedure rules on admissibility of evidence state in part that evidence, including hearsay
21 evidence, is admissible if in the judgment of the presiding officer, it is evidence on which reasonably prudent
persons are accustomed to rely in the conduct of their affairs, and is “the best evidence reasonably obtainable,
having due regard for its necessity, availability and trustworthiness.” WAC 371-08-500(1).

1 and are not submitted, or relied on as scientific or expert testimony to support the merits of
2 Soundkeeper's arguments on the legal issues.

3 Intervenor-Respondents in their reply recognize Soundkeeper's right to offer testimony to
4 establish standing, and state they only seek the narrow relief of striking portions of the
5 declarations that they believe extends beyond establishing standing and into "impermissible
6 expert-like testimony or opinions on the merits" of the legal issues in dispute. *Intervenor-*
7 *Respondents' Reply in Support of Mot. to Strike at 2*. As an alternative to its requested relief of
8 striking those objectionable portions of the declarations, Intervenor-Respondents ask that the
9 Board limit its considerations of them solely for the purpose of evaluating Soundkeeper's claim
10 of standing. *Id.* at 4 (citing *Env'tl. Prot. Info. Ctr. v. Blackwell*, 389 F. Supp. 2d 1174, 1220 (N.D.
11 Cal. 2004)). Such alternative requested relief is supported by the case law and provides a
12 workable approach given that both sides ultimately agree that the declarations can be considered
13 for purposes of establishing Soundkeeper's organization standing. However, no party disputes
14 Soundkeeper's standing as none of the remaining legal issues (or any of the original 21 legal
15 issues) challenged Soundkeeper's standing. The Board thus will not be evaluating
16 Soundkeeper's standing. However, in keeping with Soundkeeper's and Intervenor-Respondents'
17 representations, concerns and interests, the Board will not consider the declarations as evidence
18 to support the merits of Soundkeeper's arguments on the legal issues, and will leave the
19 declarations intact in the record (without striking any portion) to address Soundkeeper's interest
20 in making a record to defend against a later claim of lack of standing. The Board thus denies
21 Intervenor-Respondents' Motion to Strike.

1 **B. Summary Judgment**

2 Summary judgment is a procedure available to avoid unnecessary trials where there is no
3 genuine issue of material fact. *Am. Express Centurion Bank v. Stratman*, 172 Wn. App. 667,
4 675-76, 292 P.3d 128 (2012). The summary judgment procedure is designed to eliminate trial if
5 only questions of law remain for resolution, and neither party contests the facts relevant to a
6 legal determination. *Rainier Nat’l Bank v. Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d
7 443 (1990), *review denied*, 117 Wn.2d 1004 (1991). A party is entitled to summary judgment “if
8 the pleadings, depositions, answers to interrogatories, and admissions on file, together with the
9 affidavits, if any, show that there is no genuine issue as to any material fact and that the moving
10 party is entitled to a judgment as a matter of law.” CR 56(c); *Magula v. Benton Franklin Title*
11 *Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a summary judgment
12 proceeding is one affecting the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d
13 451, 456, 824 P.2d 1207 (1992). If the moving party satisfies its burden, then the nonmoving
14 party must present evidence demonstrating that material facts are in dispute. *Atherton Condo*
15 *Ass’n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). Bare assertions concerning
16 alleged genuine material issues do not constitute facts sufficient to defeat a summary judgment
17 motion. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 140, 331 P.3d 40 (2014). When determining
18 whether an issue of material fact exists, all facts and inferences are construed in favor of the
19 nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Once it
20 is determined that no genuine issues of material fact exist, the court then analyzes which party is
21

entitled to judgment as a matter of law. *Skagit Hill Recycling v. Skagit Co.*, 162 Wn. App. 308, 318, 253 P.3d 1135 (2011)

C. Board Jurisdiction

The Board has jurisdiction over the subject matter and parties under RCW 43.21B.110(1)(c). The Board gives deference to Ecology's expertise in administering water quality laws and on technical judgments, especially where they involve complex scientific issues. *Port of Seattle v. Pollution Control H'rgs. Bd.*, 151 Wn.2d 568, 593-94, 90 P.3d 659 (2004). In cases where the Board determines that Ecology issued an invalid NPDES permit, the Board shall order Ecology to reissue the permit consistent with all applicable state and federal statutes and guidelines. WAC 371-08-540(2).

D. Implementation of Watershed Scale Stormwater Planning (Issues 12, 13)

Issue 12 asks whether the Phase I Permit's failure to require any implementation of projects identified through basin-level planning unlawfully causes or contributes to violations of water quality standards. Issue 13 asks whether the Phase I Permit's failure to require any implementation of projects identified through basin-level planning unlawfully allows the discharge pollutants that have not been treated with all known available and reasonable methods of treatment (AKART) and/or fail to reduce the discharge of pollutants to the maximum extent practicable (MEP). Ecology and Intervenor-Respondents move for summary judgment on Issues 12 and 13, while Soundkeeper opposes the motion.²

² Soundkeeper's briefing on the motion for partial summary judgment makes clear that it is addressed only to remaining Issues 14 and 18 because Issues 11 and 17 were settled and dismissed. *See* Soundkeeper's Combined Response/Reply at 1, n. 1; Soundkeeper's Mot. for Summ. J. at 2. Besides misnumbering Issue 18 as Issue 20, *see* ORDER ON MOTIONS RE: 2019 PHASE I AND WESTERN WASHINGTON PHASE II MUNICIPAL STORMWATER PERMITS AND ORDER ON MOTION TO STRIKE PCHB No. 19-043c

1 A review of the genesis of watershed scale stormwater planning (WSSP) requirement and
2 its development in the 2013 Permits is helpful in analyzing Legal Issues 12 and 13. In reviewing
3 challenges to the stormwater management program requirements in the 2007 Phase I and Phase
4 II Permits, the Board concluded that requiring municipalities to implement low impact
5 development at the watershed level was not at that time reasonable or practical. *See Puget*
6 *Soundkeeper Alliance v. Dep't of Ecology*, PCHB Nos. 07-021, 07-026 – 030, and 07-037, p. 59
7 COL 17 (Findings of Fact, Conclusions of Law and Order, Aug. 7, 2008) (2008 Phase I Final
8 Order); *Puget Soundkeeper Alliance v. Dep't of Ecology*, PCHB Nos. 07-022, 07-023, pp. 47-48,
9 COL 5, 6 (Findings of Fact, Conclusions of Law, and Order, Feb. 2, 2009) (2009 Phase II Final
10 Order). The Board also concluded that the CWA and state water quality laws anticipate more
11 stringent requirements on municipalities discharging stormwater, and that efforts to
12 address stormwater on a scale broader than the parcel and subdivision levels may be necessary to
13 meet the state AKART and federal MEP standards to reduce stormwater pollutants. *2008 Phase*
14 *I Final Order*, pp. 59-60, COL 17. The Board further stated that city and county permittees
15 should identify areas where potential basin planning would help in reducing the harmful impacts
16 of stormwater discharges on aquatic resources, and directed Ecology to require permittees to
17 identify, before the next permit cycle, areas for basin or watershed planning. *Id.*³

18
19 n. 10 below, it is unclear why Soundkeeper's Combined Response/Reply states that "Soundkeeper requests
20 summary judgment on Issues 12, 13, 20 and 21." *See* Soundkeeper Combined Response/Reply at 14. Given that
21 Soundkeeper's motion for partial summary judgment clearly addressed remaining Issues 14 and 18 only, the Board
will consider Soundkeeper as having moved for summary judgment on those issues only, and not Issues 12 and 13.
³ The Board remanded the 2007 Permits to Ecology for modification consistent with its decisions. *2008 Phase I*
Final Order, pp. 71-73; *2009 Phase II Final Order*, p. 55. Ecology did not modify and reissue the 2007 Permits, but
instead developed technical guidance and a performance standard for low impact development for both Phase I and
Western Washington Phase II Permits. *2013 Permits Final Order*, p. 16, FF 8.

1 Ecology incorporated WSSP requirements in the 2013 Phase I and II Permits, the third
2 iteration of the Permits, which became effective from August 1, 2013, to July 31, 2018. *2013*
3 *Permits Final Order*, p. 68, COL 42. The 2013 Permits state that the objective of the WSSP
4 requirement:

5 is to identify a stormwater management strategy or strategies that would result in
6 hydrologic and water quality conditions that fully support “existing uses,” and
7 “designated uses,” as those terms are defined in WAC 173-201A-020, throughout
8 the stream system.
9 *Terry Decl., Ex. G*, p. 853 (2013 Phase I Permit Condition S5.C.5.c); *Ex. H*, p. 876 (2013 Phase
10 *II Permit Condition S.5.C.4.g.*). A central purpose of the WSSP requirement in the 2013 Permits
11 was to specify future steps that protect water quality by assessing how landscape scale changes
12 affect water resources. *2013 Permits Final Order*, p. 39, FF 54. Site-specific
13 stormwater control strategies are inadequate to protect existing beneficial uses in the stream
14 system without strategies forecasting the location of and impact from growth. *City of*
15 *Woodinville*, PCHB No. 15-013, p. 6. WSSP is intended to fill that gap by evaluating how
16 landscape changes affect water resources. *Id.*

17 Relevant to Issues 12 and 13, the WSSP requirements for Phase I permittees included:
18 assessing existing conditions of a selected watershed through data collection and sampling,
19 modeling future water quality conditions, developing stormwater management strategies based
20 on the data, and submitting a final watershed scale stormwater plan. *2013 Permits Final Order*,
21 pp. 40-42, FF 56-61. Under the 2013 Permits, the Phase I permittees were required to convene

1 and lead separate WSSP processes. But Phase II permittees had limited roles and were not
2 required to collect new water quality and stream flow data, model the results,
3 develop stormwater management strategies, or fund any portion of the watershed planning. *Id.*,
4 at 44-45, 70.

5 Many permittees appealed the 2013 Permits and challenged the WSSP conditions in the
6 2013 Phase I Permit that pertain to data collection and sampling, modeling, and developing
7 stormwater management strategies based on the data. Following an evidentiary hearing, the
8 Board concluded that Ecology's implementation of the WSSP requirements in the 2013 Permits
9 complied with its 2008 Phase I Final Order. *Id.*, at 67-68, COL 42. However, the Board found
10 that the limited watershed planning requirements imposed on Phase II permittees inherently
11 compromised the ability of Phase I permittees to comply with the watershed planning scope of
12 work and schedule, the continuous runoff modeling, and the final watershed scale stormwater
13 plan. *Id.*, at 69-71, COL 45-49. The Board therefore remanded the case and directed Ecology to
14 modify the 2013 Permits to ensure that the scope of work for the designated watershed plan
15 included the full participation of both Phase I and Phase II permittees. *Id.*, p. 72, COL 51.

16 Notably, the Board deferred the approval of deadlines for developing the watershed
17 plan and the approval of proposals of a particular watershed basin for planning, including
18 proposals for subbasins, to the iterative process of the Permits and Ecology's discretion under the
19 terms of the Permits. *Id.*, p. 80, 84, COL 64, 70.

20 Ecology and Intervenor-Respondents argue that they are entitled to summary judgment
21 on Issues 12 and 13 because Soundkeeper has not shown the existence of genuine issues of

1 material fact as to whether the Phase I Permit “failed” to require any implementation of projects
2 identified through WSSP. To the contrary, Ecology and Intervenor-Respondents contend that
3 because the 2013 Phase I Permit WSSP requirements did not require a list of shovel ready
4 projects to be implemented by the 2019 Permits, Soundkeeper has not established that the current
5 Phase I Permit failed to implement WSSP projects that could cause or contribute to violations of
6 water quality standards, or that would result in the discharge of pollutants contrary to AKART
7 and MEP standards. Ecology further contends that contrary to establishing any failure by the
8 2019 Permits to implement a list of projects, the Permits’ new requirement of Stormwater
9 Management Action Planning (SMAP) responds to the Board’s decision on the 2013 Permits and
10 represents the next step in accomplishing WSSP.

11 The Board agrees with Ecology and Intervenor-Respondents. The 2013 Phase I Permit
12 clearly stated that the purpose of WSSP was to identify stormwater management “strategy or
13 strategies” that would result in hydrologic and water quality conditions that fully support existing
14 uses and designated uses. *Terry Decl., Ex. G, p. 853 (Condition S5.C.5.c)*. The WSSP
15 requirement was expected to evolve over time based on information gleaned and lessons learned.
16 *Barney Decl., Ex. B, pp. 17, 39*. To accomplish WSSP’s purpose, Ecology required Phase I
17 counties to select the watershed of a particular stream that was currently in good condition but
18 also expected to experience adverse impacts from stormwater runoff due to development
19 pressure. Phase I counties were then required to model the full development buildout conditions
20 to determine what actions, beyond site specific stormwater management requirements, will be
21 necessary to protect water quality in the selected watershed. As a result of the modeling, the

1 Phase I counties identified projects and actions that would prevent future declines in water
2 quality if the modeled conditions for some of the development scenarios were to take place. The
3 modeling exercise was not intended to create a list of specific projects to be built in certain
4 watersheds, where failure to implement those projects may give rise to claims of violation of
5 water quality standards and/or MEP/AKART standards. *Brimmer Decl., Ex. A, pp. 15-16;*
6 *Dinicola Decl., ¶¶ 3, 4* (because watershed plans modeled conceptual alternative scenarios, any
7 of which could take place, the plans did not result in a list of projects to implement immediately).
8 Rather, in keeping with the Permit's programmatic nature, the modeling identified stormwater
9 impacts in selected watersheds for a range of possible future development scenarios, and
10 generated a suite of actions and strategies, beyond individual site specific stormwater projects, to
11 prevent negative effects from the various modeled development scenarios. *Id., ¶ 4; Barney*
12 *Decl., Ex. B, p. 18* (one important strategy identified through modeling exercise was that
13 changing land use designation or zoning will help protect water quality at lower costs).

14 The 2019 Permits build on the results of the calibrated model for the selected watersheds
15 by requiring SMAP for both Phase I and Phase II permittees whereby permittees are to focus
16 their planning by identifying specific projects and activities for near and long-term
17 implementation in a single sub-basin or catchment area. *Barney Decl., Ex. B, pp. 39-41;*
18 *Dinicola Decl., ¶¶ 5-6*. Identified projects will either attain water quality benefits for existing
19 conditions or protect water quality under the most likely future scenarios. *Id.; Second Barney*
20 *Decl., Ex. B, pp. 12-15 (Phase I Permit Condition S5.C.6.d), Ex. A, pp. 12-15 (Phase II Permit*
21 *Condition S5.C.1.d)*. Among other things, the new SMAP requirement in 2019 Phase I Permit

1 Condition S5.C.6.d.ii directs permittees to develop a plan that will include: 1) stormwater facility
2 retrofits needed for the area; 2) land management/development strategies and/or actions
3 identified for water quality management; 3) targeted, enhanced, or customized implementation of
4 other stormwater management actions to support other specifically identified stormwater
5 management strategies and actions for the overall watershed, or for the catchment area in
6 particular; 4) proposed implementation schedule (aligning with the state's Growth Management
7 Act comprehensive planning requirements) and budget sources for both short term and long-term
8 actions; and 5) process and schedule to provide future assessment and feedback to improve the
9 planning and implementation of procedures or process. *Barney Decl., Ex. B, pp. 41, 44-46;*
10 *Dinicola Decl., ¶¶ 6-7; Second Brimmer Decl., Ex. K, pp. 4-5; see generally, Barney Decl., Ex.*
11 *C, pp. 11-15 (SMAP Guidance).*

12 Soundkeeper mainly argues that the current WSSP requirements is yet another plan,
13 albeit at the sub-basin level, and that another plan without requiring implementation fails to meet
14 MEP/AKART standards. Soundkeeper does not offer any evidence to contradict Ecology's
15 rationale and decision on the current WSSP requirements as reflected in the Permits' Fact Sheet
16 and Ecology's declarations, stating only that it will question Ecology at the hearing on its
17 reasoning and basis on the WSSP.⁴

19 ⁴ Soundkeeper's vague reference that it had requested unspecified information in discovery and plans to question
20 Ecology at hearing about its reasoning and decision does not create a genuine issue of material fact precluding
21 summary judgment, especially where Ecology explained its decision and reasoning in the Fact Sheet and declaration
in support of its cross motion. *See Barney Decl., Ex. B, pp. 38-46; Dinicola Decl., ¶¶ 3-10.* Moreover, assertions
that forthcoming evidence may rebut the moving party's evidence supporting summary judgment lack specificity
sufficient to preclude summary judgment. *Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.12d 157, 169, 273 P.3d 965
(2012).

1 But as the history of the WSSP requirement recounted above demonstrates, WSSP was to
2 be implemented in steps or phases with each new permit cycle, using the iterative process as data
3 is collected and analyzed to identify what stormwater management strategies would result in
4 water quality conditions that fully support existing and designated uses. First, the Board directed
5 Ecology to require permittees to identify areas where potential WSSP would help in reducing
6 impacts of stormwater runoff before the 2013 Permit cycle. The 2013 Permit responded by
7 requiring such planning and established a very specific framework for WSSP that included
8 selection of a watershed and the type of modeling to be undertaken. The 2013 WSSP
9 requirement was challenged by permittees but upheld by the Board. The Board concluded that
10 the 2013 Phase I and Phase II Permits complied with the Board's prior ruling on WSSP in the
11 2007 Permits, and except in limited circumstances, the Permits "reasonably and properly
12 commence the phasing-in of watershed-scale basin planning as a tool and strategy to control
13 stormwater" to meet AKART and MEP standards. *2013 Permits Final Order*, p. 68, COL 43.

14 The Board views the SMAP requirement in the current Permits as another incremental
15 step forward from the initial phasing in of the WSSP requirements outlined in the 2013 Permits.
16 Such an approach is consistent with the Board's recognition that each water quality discharge
17 permit should build on the previous permit as knowledge is acquired, uncertainties reduced, and
18 technology developed or improved. *Crown Resources Corp. v. Dep't of Ecology*, PCHB No. 14-
19 018, p. 42, COL 4 (2015). This phased approach to WSSP is also within Ecology's broad
20 discretion to determine the manner, timing, and method of ensuring compliance with AKART
21 and MEP standards under state and federal law. *2008 Final Order Condition S4*, p. 40, COL 16;

1 *Puget Soundkeeper All. v. Dep't of Ecology*, 191 Wn.2d 631, 638-41, 424 P.3d 1173, 1176-78
2 (2018) (Ecology, as agency charged with administering and enforcing NPDES permit scheme
3 using its expertise, has discretion to choose specific way of ensuring compliance by permittee).
4 As permittees complete each of SMAP's proscribed elements, process, and timeline, and commit
5 to building specified projects, the Board anticipates more progress in implementing projects that
6 will both inform future permit requirements and result in water quality improvements.

7 In sum, the Board grants summary judgment to Ecology and Intervenor-Respondents on
8 Issues 12 and 13 and dismisses the same.

9 **E. Condition S4 (Issues 14, 15, 18, and 19)**

10 Soundkeeper challenges the adaptive management provisions in Condition S4 of both
11 Phase I and Phase II Permits in overlapping Issues 14, 15, 18, and 19. Resolution of these issues
12 is informed by the Board's prior rulings on Condition S4, its purpose, and how it operates with
13 other conditions of the Permits. Thus, discussion on these points follows below. In so
14 discussing and analyzing the legal issues, the Board will mainly reference and cite only the Phase
15 I Permit because Condition S4 is identical in both Permits. Differences between the two Permits
16 are noted where necessary.

17 1. S4 Operation and Prior Litigation

18 Condition S4 is entitled "Compliance with Standards," and contains Parts A-F. Parts A
19 through E establish the legal standards applicable to the management of stormwater. *Terry*
20 *Decl., Ex. A, p. 4*. The condition was extensively litigated in the 2007 Permits, resulting in the
21 Board issuing a summary judgment order and findings of fact, conclusions of law, and order.

1 The Board ruled on summary judgment that Part A of Condition S4, which prohibits the
2 discharge of toxicants to state waters, and Part B, which does not authorize discharges that
3 violate various standards in state law state, are required by state law. *2008 SJ Order Condition*
4 *S4, pp. 30-32*. Parts C and D provide, respectively, that permittees shall reduce the discharge of
5 pollutants to MEP, and use AKART to prevent and control water pollution. *Terry Decl., Ex. A,*
6 *p. 4*.

7 Part F establishes an adaptive management response process that is required for
8 violations of water quality standards identified pursuant to arts A and B. *Brimmer Decl., Ex. E,*
9 *pp. 4-6*. Condition S4.F has been termed the “compliance pathway.” *2008 Final Order, p. 11,*
10 *FF 8*. The legal issues pertaining to Condition S4 in this appeal challenge the validity and
11 adequacy of the S4.F compliance pathway.

12 Condition S4 is but one element of the Permits’ regulation of stormwater discharges. The
13 core regulatory element of all municipal stormwater general permits is the Stormwater
14 Management Program (SWMP) in Condition S5. *2013 Permits Final Order, p. 19, FF 19;*
15 *Killelea Decl., ¶ 3*. The SWMP is a set of actions and activities designed to protect water
16 quality and reduce the discharge of pollutants from MS4s to meet MEP and AKART standards.
17 *Terry Decl., Ex. A, p. 6 (Phase I Permit Condition S5.A); 2013 Permits Final Order, p. 20, FF*
18 *19*. The SWMP’s mandatory components for both Phase I and Phase II Permits are essentially
19 the same, and include mapping, education and outreach, public involvement, illicit discharge
20 detection and elimination, controlling runoff from new development and redevelopment,
21 stormwater planning, and a source control program for existing development. *Terry Decl., Ex. A,*

1 *p. 847 (Phase I Permit Condition S5.A).*⁵ The goal of these mandatory actions was to reduce and
2 eliminate violations of water quality standards caused by discharges from MS4s over time and
3 across the breadth of permittees' various jurisdictions. *2008 Final Order Condition S4, p. 31,*
4 *COL 3.*

5 There was complete agreement from all parties and stormwater experts who testified
6 before the Board at the 2008 hearing on Condition S4 that there will nonetheless be instances of
7 site specific water quality standard violations from MS4 discharges. Condition S4 was created to
8 address these violations. *Id., pp. 31-32, COL 3-4; see also, Killelea Decl., ¶ 7; Durbin Decl., ¶¶*
9 *56-57*

10 Under Condition S4.F, permittees must notify Ecology if it “becomes aware, based on
11 credible site-specific information that a discharge from the MS4 owned or operated by the
12 Permittee is causing or contributing to a known or likely violation of water quality standards in
13 the receiving water.” Ecology may then require permittees to review its stormwater
14 management program and submit an adaptive management response unless it determines that
15 the specific water quality violation in the receiving water is already being addressed by a
16 water quality cleanup plan or implementation of other permit requirements such as a Total
17 Maximum Daily Load (TMDL).⁶ The adaptive management report must essentially describe
18

19 ⁵ The Phase II Permit does not include the structural stormwater control element. *Killelea Decl., ¶ 3.* However, any
20 difference in the required elements of Condition S5 between the two Permits are not relevant to the analysis of the
21 legal issues in this case.

⁶ TMDLs are addressed in Condition S7 of the Permits. Under the CWA, when a water body is included on the
state's 303(d) impaired list for not meeting water quality standards for a given pollutant, a TMDL for the pollutant
parameter must be prepared. 33 U.S.C. § 1313(d). In brief, a TMDL is a cleanup plan that determines the amount of
a given pollutant that can be discharged to a water body and still meet standards (loading capacity), and allocates

1 how permittees will address the violation, including current and potential additional best
2 management practices, and a schedule for implementing additional best management practices.⁷
3 Ecology approves the adaptive management report or requires modification as needed to meet
4 AKART on a site specific basis. Once approved, permittees must implement the additional
5 BMPs and report on them, with Ecology monitoring and overseeing the adaptive management
6 response. *Terry Decl., Ex. A, p. (Phase I Permit Condition S4.F.1-3); Killelea Decl., ¶ 8;*
7 *Barney Decl., Ex. A, p. 61 (describing when S4.F triggered).* Ecology deems permittees in
8 compliance with the Permit as long as they comply with the adaptive management process
9 described above. *Id.*

10 Thus, the “compliance pathway” of Condition S4 uses a cooperative iterative process to
11 correct site-specific violations of water quality standards while relying overall on a broader
12 programmatic process to achieve jurisdiction wide compliance with water quality standards over
13 time. In the challenges to the 2007 Permits, the Board concluded that Condition S4 is a valid
14 exercise of Ecology’s discretion to define the manner, method, and timing for requiring
15 compliance with state water quality standards. *2008 Final Order Condition S4, p. 40, COL 16.*
16 However, the Board modified parts of Condition S4 to clarify the notification and evaluation
17 process, as well as specifying when the adaptive management response is required and the
18

19 that load among the various sources of the pollutant (load allocation). *Sierra Club v. Dep’t of Ecology*, PCHB No.
20 11-184, p. 4 (July 19, 2013).

21 ⁷ Best management practices are “schedules of activities, prohibitions of practices, maintenance procedures, and/or
managerial practices approved by Ecology that . . . prevent or reduce the release of pollutants and other adverse
impacts to waters of Washington State.” *Terry Decl., Ex. A, p. 57* (2019 Phase I Permit Definitions and Acronyms);
see also, 40 C.F.R. § 122.2 Definitions; WAC 173-226-030(3).

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1 standard (AKART) to evaluate the adequacy of the adaptive management report and
2 implementation schedule. *Id.*, pp. 40-46, COL 17-24.

3 Notably, the Board drafted the following language and required that it be added to
4 Condition S4.F.3.d:

5 If, based on the information provided under this subsection, Ecology determines
6 that modification of the BMPs or implementation schedule is necessary to meet
7 AKART on a site-specific basis, the Permittee shall make such modifications as
8 Ecology directs. In the event there are ongoing violations of water quality
9 standards despite the implementation of the BMP approach of this Section, the
10 Permittee may be subject to compliance schedules to eliminate the violation under
11 WAC 173-201A-510(4) and WAC 173-226-180 or other enforcement orders as
12 Ecology deems appropriate during the term of this Permit.

13 *Id.*, pp. 46, 51-52; *Terry Decl., Ex. A.*, pp. 5-6. (Phase I Permit Condition S4.F.3.d). The Board
14 drafted language explicitly provides a means to address potential ongoing violations of water
15 quality by stating that Ecology may require more to meet AKART or address water quality
16 standards violations. *Id.*, pp. 44-45, COL 22-24. The Board explained that the provision was
17 necessary to ensure that there was an ongoing iterative process between Ecology and permittees
18 that continued to apply AKART to reach ultimate compliance with water quality standards, for
19 “only in this manner can compliance with those standards be the goal line, rather than a mere
20 aspirational goal.” *Id.*, p. 45, COL 23. The above language, along with the rest of Condition S4,
21 remain essentially unchanged and carried forward to the present Permits. *Killelea Decl.*, ¶ 7.

2. S4 Purpose

Condition S4.F was designed to augment the SWMP in situations where site-specific
action is required to address newly discovered or newly occurring discharges from the MS4s that

1 is causing or contributing to water quality standard violations in the receiving waters. *Id.*, p. 21,
2 COL 25. While being an important tool to combat pollutants in municipal stormwater discharges
3 by targeting only site-specific violations of water quality standards, Condition S4.F does not
4 offer a broader, programmatic approach to eliminating water quality problems associated with
5 municipal stormwater. *Id.*, p. 47, COL 25. It was not intended to be the primary permit term to
6 achieve eventual compliance with water quality standards on a programmatic or jurisdiction-
7 wide basis. The primary means and manner to achieve that is through other permit conditions;
8 specifically, the SWMP requirements of Condition S5 as discussed above as well as the
9 monitoring provisions of Condition S8. *Id.*⁸ Thus, Condition S4 is one component out of many
10 in the programmatic Permits that work together to protect water quality from stormwater
11 pollution.

12 In sum, Condition S4, as modified by the Board in 2008, was a carefully crafted solution
13 to reconcile the state law requirement to comply with water quality standards with the
14 recognition that it is not reasonable for every MS4 discharge to comply with those standards at
15 all times and under all conditions given the large number of outfalls and the limited control that
16 municipalities have over stormwater pollutants that enter their MS4 systems. *Id.*, pp. 13, 23-26,
17 31-32, FF 10, 28-31, COL 4-5.

18 ⁸ The Board also specifically rejected the claim raised by Soundkeeper and others that the adaptive management
19 process in Condition S4.F unlawfully fails to set timelines (such as by way of compliance schedules under WAC
20 173-201A-510) necessary to ensure that discharges will comply with water quality standards. The Board explained
21 that Ecology had discretion in using compliance schedules to address violations of water quality standards, and thus
its choice of using an adaptive management process in Condition S4.F did not render it an invalid compliance
schedule, but was “rather a valid exercise of Ecology’s discretion to define the manner, method, and timing for
requiring compliance with state water quality standards.” *2008 Final Order Condition S4*, pp. 36-40, COL 11-16.

1 3. Compliance with Water Quality Standards (Issues 14 and 18)⁹

2 Issues 14 and 18 asks, respectively, whether Phase I and Phase II Permits' Condition S4
3 fail to require sufficiently stringent adaptive management measures to ensure the permits do not
4 cause or contribute to violations of water quality standards. All parties and Intervenor-
5 Respondents move for summary judgment on Issues 14 and 18, arguing there are no genuine
6 issues of material fact requiring a hearing.¹⁰ The Board agrees that Issues 14 and 18 are
7 appropriate for summary judgment.

8 Preliminarily, the Board clarifies Soundkeeper's requests for summary judgment.
9 Soundkeeper argues in its Combined Response/Reply that there is no genuine issue of material
10 fact that Condition S4 fails to meet the requirements of state and federal law. Soundkeeper
11 includes within its Condition S4 arguments two instances where it requests "summary judgment
12 on Issues 12, 13, 20, and 21." *See* Soundkeeper Combined Response/Reply at 8, 14. The request
13 is confusing because Issues 12, 13, 20, and 21 do not relate to condition S4. Rather, they relate to
14 WSSP discussed above (Issues 12, 13), and the challenge to Phase II Permits' failure to apply
15

16 ⁹ Even though Issues 14, 15, 18, and 19 are related in that they all concern Condition S4, the analysis in this order
17 groups Issues 14 and 18 together (compliance with water quality standards), and Issues 15 and 19 together
18 (compliance with MEP/AKART) for clarity and because the two pairs of issues each share a common claimed
19 violation. However, the arguments in the briefing on the four Condition S4 issues are lumped together and not
clearly separated to identify which argument corresponds to a particular issue(s). *See, e.g.,* Soundkeeper's
Combined Response/Reply at 2-12; Ecology's Response/Cross Motion at 8-13. Thus, the Board's analysis on Issues
14 and 18 are also applicable to Issues 15 and 19, and vice versa, for purposes of addressing all the arguments of the
parties and Intervenor-Respondents.

20 ¹⁰ Soundkeeper's "Motion for Summary Judgment on Issue Nos. 11, 14, 17, and 20 and Memorandum"
21 misnumbers the last issue – former Issue 20 related to condition S4 should be Issue 18. *See Third Amended
Consolidation and Prehearing Order (March 27, 2020).*

1 structural stormwater controls (Issues 20, 21, which were dismissed due to settlement). The
2 confusing situation may have been a result of Soundkeeper misnumbering the legal issues, an
3 understandable result given that issues were dismissed due to settlement during the pendency of
4 summary judgment briefing. Nevertheless, the Board will consider Soundkeeper as moving for
5 summary judgment only on Issues 14 and 18 since it was clearly requested in its Motion for
6 Summary Judgment, and not consider any other requests for summary dismissal inappropriately
7 raised in Soundkeeper's Combined Response/Reply.

8 Soundkeeper mainly relies on 40 C.F.R. § 122.44(d) to support its contention that
9 condition S4 allows permittees to violate water quality standards.¹¹ But 40 C.F.R. § 122.44(d)
10 (or federal law in general) does not require Ecology to establish water quality-based effluent
11 limits in these Permits because they do not apply to municipal stormwater permits.

12 The CWA generally requires that discharges authorized by NPDES permits strictly
13 comply with state water quality standards, including effluent limitations, in 33 U.S.C. §
14 1311(b)(1)(C). However, under 33 U.S.C. § 1342(p)(3)(B), MS4 discharges do not have to
15 comply with that requirement. Rather, MS4 discharges need only comply with the MEP
16 standard, which Congress added to the CWA in 1987 to specifically govern municipal
17 stormwater permits, recognizing that they are different than other NPDES permits. *Defenders of*

18
19 ¹¹ 40 C.F.R. § 122.44(d) generally provides that each NPDES permit shall include conditions and requirements
20 necessary to achieve water quality standards, including state narrative criteria, and those conditions and limitations
21 must "control all pollutants or pollutant parameters which are or may be discharged at a level which will cause, have
the reasonable potential to cause, or contribute to an excursion above" any water quality standard, including
narrative criteria. 40 C.F.R. § 122.44(d). When the state determines, using the procedures outlined in 40 C.F.R. §
122.44(d)(ii), that a discharge will cause or has the reasonable potential to cause or contribute to a violation of water
quality standard or narrative criteria for any pollutant, the permit *must contain effluent limits* for that pollutant. 40
C.F.R. § 122.44(d)(iii) (emphasis added).

1 *Wildlife v. Browner*, 191 F.3d 1159, 1164-66 (9th Cir. 1999), *amended by on denial of reh'g*, 197
2 F.3d 1035 (9th Cir. 1999) (interpreting the MEP standard in 33 U.S.C. §1342(p)(3)(B)(iii) of the
3 CWA to *not require* MS4 discharges to comply strictly with water quality standards, including
4 state effluent limitations in 33 U.S.C § 1311(b)(1)(C), rather, EPA or state with delegated
5 NPDES permitting authority has discretion to so require); *2008 SJ Order Condition S4*, pp. 16-
6 *19* (explaining *Browner's* analysis and concluding the same); *Natural Res. Def. Council, Inc. v.*
7 *EPA*, 966 F.2d 1292, 1308 (9th Cir. 1992) (Congress retained existing, stricter controls for
8 industrial stormwater discharges, but prescribed new controls for MS4 discharges to meet MEP
9 standard in 33 U.S.C. § 1342(p)(3)(B)(iii), which does not mandate minimum standards or
10 performance requirements).

11 Here, Soundkeeper's reliance on 40 C.F.R. 122.44(d)'s charge that permits must contain
12 effluent limits when a discharge will cause or has reasonable potential to cause or contribute to a
13 violation of water quality standards is of no help because that regulation derives its authority
14 from §301(b)(1)(c) of the CWA (33 U.S.C. § 1311(b)(1)(c)), the section that does not apply to
15 municipal stormwater discharges. *Defenders of Wildlife*, 191 F.3d at 1165. Instead, Ecology and
16 Intervenor-Respondents correctly point out that the federal regulation applicable here to
17 municipal stormwater discharges is 40 C.F.R. § 122.26, which derives its authority from the
18 MEP standard in § 402(p)(3)(B) of the CWA (33 U.S.C. § 1342(p)(3)(B)). *See*, National
19 Pollutant Discharge Elimination System Permit Application Regulations for Stormwater
20 Discharges, 55 Fed. Reg. 47,994 (Nov. 16, 1990) (codified in 40 C.F.R. § 122.26); *see also*,
21 *Barney Decl., Ex. B*, p. 26 (Fact Sheet citing applicable federal regulation, 40 C.F.R. § 122.26, in

1 describing key differences in how municipal stormwater discharges are regulated compared to
2 other discharges). Soundkeeper fails to address *Browner* and the controlling statute and
3 regulation.

4 Soundkeeper argues that the Board’s 2008 ruling that 40 C.F.R. § 122.44 does not require
5 effluent limits for municipal stormwater must be reconsidered in light of the “analogous
6 situation” in *Washington State Dairy Federation v. Dep’t of Ecology*, 18 Wn. App. 2d 259, 490
7 P.3d 290 (2021), where the Court of Appeals concluded that an NPDES general permit for
8 confined animal feeding operations (CAFO) must ensure that they do not cause or contribute to
9 violations of water quality standard under both federal and state permitting regulations.

10 Soundkeeper Combined Response/Reply at 10 (citing *Wash. St. Dairy Fed’n*, 490 P.3d at 307).

11 But *Dairy Fed’n* is inapposite and does not support Soundkeeper’s claim that 40 C.F.R §
12 122.44(d) is applicable here. CAFOs are agricultural facilities that confine and feed animals, and
13 generate discharges of manure and process wastewater from distinct and identifiable structures
14 (earthen lagoons, composting areas, and animal pens) controlled by the facility’s owner or
15 operator. *Dairy Fed’n*, 18 Wn. App. 2d at 266-67. The discharges contain pollutants that are
16 regulated as “point sources” under the federal NPDES and state permitting requirements. *Id.* at
17 269-70. Those requirements may include “additional water quality based effluent limitations.”
18 *Id.* at 307-08 (citing 33 U.S.C. § 1311(b)(1) and 40 C.F.R. § 122.44(d)(1)(iii)). Thus, the federal
19 statute and regulation that the Court of Appeals in *Dairy Fed’n* cite as requiring water quality
20 based effluent limitations for CAFO discharges are the same ones that do not apply to municipal
21 stormwater discharges given their unique nature. In short, the municipal stormwater permits at

1 issue are unique types of NPDES permits governed instead by 33 U.S.C. § 1342(p)(3)(B)(iii) and
2 40 C.F.R. § 122.26.

3 Finally, Soundkeeper’s citation to WAC 173-201A-510(3) is of no help either as the
4 regulation does not require the Permits to include effluent limits. Nor has Soundkeeper
5 demonstrated that Condition S4 in the current Permits fails to conform with WAC 173-201A-
6 510(3). Titled “Means of implementation,” WAC 173-201A-510 sets out means of
7 implementing water quality standards for nonpoint source and stormwater pollution.¹² As the

8
9 ¹² WAC 173-201A-501 (emphasis added) states in relevant part:

- 10 (1) **Permitting.** The primary means to be used for controlling municipal, commercial, and industrial waste
11 discharges shall be through the issuance of waste discharge permits, as provided for in RCW
12 90.48.160, 90.48.162, and 90.48.260. Waste discharge permits, whether issued pursuant to the
13 [NPDES] or otherwise, must be conditioned so the discharges authorized will meet the water quality
14 standards. No waste discharge permit can be issued that causes or contributes to a violation of water
15 quality criteria, except as provided for in this chapter . . .
- 16 (3) **Nonpoint source and stormwater pollution.**
17 (a) Activities which generate nonpoint source pollution shall be conducted so as to comply with the
18 water quality standards. The primary means to be used for requiring compliance with the standards
19 shall be through best management practices required in waste discharge permits, rules, orders, and
20 directives issued by the department for activities which generate nonpoint source pollution.
21 (b) Best management practices shall be applied so that when all appropriate combinations of individual
best management practices are utilized, violation of water quality criteria shall be prevented. *If a
discharger is applying all best management practices appropriate or required by the department and a
violation of water quality criteria occurs, the discharger shall modify existing practices or apply
further water pollution control measures, selected or approved by the department, to achieve
compliance with water quality criteria. Best management practices established in permits, orders,
rules, or directives of the department shall be reviewed and modified, as appropriate, so as to achieve
compliance with water quality criteria.*
(c) Activities which contribute to nonpoint source pollution shall be conducted utilizing best
management practices to prevent violation of water quality criteria. When applicable best management
practices are not being implemented, the department may conclude individual activities are causing
pollution in violation of RCW 90.48.080. In these situations, the department may pursue orders,
directives, permits, or civil or criminal sanctions to gain compliance with the standards.
(d) Activities which cause pollution of stormwater shall be conducted so as to comply with the water
quality standards. *The primary means to be used for requiring compliance with the standards shall be
through best management practices required in waste discharge permits, rules, orders, and directives
issued by the department for activities which generate stormwater pollution. The consideration and
control procedures in (b) and (c) of this subsection apply to the control of pollutants in stormwater.*

1 Board in 2008 noted, in the context of ruling that Condition S4.F is a permissible adaptive
2 management approach, subsection (3) of WAC 173-201A-510 “specifically direct[s] the adaptive
3 use of best management practices as the primary means of achieving water compliance in waste
4 discharge permits directed at control of pollutants in stormwater. WAC 173-201A-510(3).”
5 *2008 Final Order Condition S4, p. 38, COL 13.* Condition S4.F, as explained above, is such an
6 adaptive management process of using best management practices (BMPs) aimed at ensuring
7 MS4 discharges do not cause or contribute to water quality violations. And in using such a
8 process to achieve compliance with water quality standards, the Board has already ruled that
9 Ecology “has considerable leeway in defining the permit terms that will effect compliance over
10 the short and long-term . . . and powers to define, through permit terms, the ongoing iterative
11 process necessary to achieve ultimate compliance with water quality standards.” *2008 SJ Order*
12 *Condition S4, pp. 30-31.* The Board has also determined that Condition S4.F “is a valid exercise
13 of Ecology’s discretion to define the manner, method, and timing for requiring compliance with
14 state water quality standards.” *2008 Final Order Condition S4, p. 40, COL 16.*

15 Against this backdrop of Board and caselaw precedent, Soundkeeper relies on the
16 undisputed facts that water quality remains degraded in many streams on the 303(d) impaired list
17 and that salmon pre-spawn mortality continue to occur, to support its claim that Condition S4
18 must therefore be revised (or other permit conditions strengthened) so that the Permits meet the
19 requirements of WAC 173-201A-510 and 40 C.F.R. § 122.44(d), or do not cause or contribute to
20 water quality standard violations. Soundkeeper Combined Response/Reply at 7, 12; *Brimmer*

1 *Decl., Ex. D* (streams on 303(d) list). The Board does not find the argument persuasive for
2 several reasons.

3 First, as analyzed above, neither WAC 173-201A-510 nor 40 C.F.R. § 122.44(d) mandate
4 that Ecology include effluent limits in the Permits. Second, that streams remain impaired or
5 have deteriorated does not establish that the impairment is a result of MS4 discharge into the
6 identified streams. *See, e.g., Durbin Decl., ¶ 46.* Nor do the occurrence of impaired streams and
7 salmon pre-spawn mortality establish by themselves, as a matter of law, that Condition S4 fails
8 to ensure that the Permits do not cause or contribute to violations of water quality standards.

9 Soundkeeper's claim as such misunderstands the purpose and operation of Condition
10 S4.F's adaptive management process as discussed above. As stated, that process is intended to
11 apply in a narrow set of circumstances where a known, identifiable MS4 discharge is causing or
12 contributing to a violation of water quality standard at a specific site. Condition S4.F then
13 requires action to address the violation, in the form of BMPs that apply AKART to the discharge
14 in order to prevent or reduce pollutants in the receiving water. *Terry Decl., Ex. A, p. 5 (Phase I*
15 *Permit Condition S4.F.3); Killelea Decl., ¶ 8.* In other words, Condition S4 addresses the
16 situation where credible, site-specific information show that a violation of water quality
17 standards is occurring despite the broader programmatic process in other Permit conditions being
18 in place to achieve jurisdiction wide compliance with water quality standards over time. *Killelea*
19 *Decl., ¶¶ 7-8; FFCOL, p. 40.* The long-term water quality problems and associated salmon pre-
20 spawn mortality resulting from pollutants in stormwater are not problems which Condition S4
21 was designed to address. *2008 Final Order Condition S4, p. 33, COL 6* (known, complex, long-

1 term water quality problems that permittees address through existing clean-up plans and/or the
2 permits' SWMP requirements are not subject of Condition S4.F adaptive management
3 response).¹³ All parties, including Soundkeeper, acknowledged in 2008 that it would take more
4 than one permit cycle and many years to fully address the complexity of reducing pollutant
5 levels in municipal stormwater discharges. *Id.*, pp. 25-26, FF 31-32.

6 On this record, Condition S4 is functioning as intended within the larger framework of
7 the Permits in conjunction with other conditions. *Id.*, pp. 33, 40, COL 6, 16; Killelea Decl., ¶¶ 7-
8 8; Durbin Decl., ¶¶ 56-63. Ecology's S4.F notification spreadsheet shows that permittees
9 reported around 240 site-specific water quality incidents from 2009 to 2020, the vast majority of
10 which were resolved through another condition in the Permits. The spreadsheet also shows that
11 five reports required an adaptive management plan. *Brimmer Decl., Ex. B; Durbin Decl., ¶ 45.*
12 Ecology also added Appendix 13 to the Phase I Permit in 2016 to incorporate requirements
13 applicable to City of Seattle in response to a significant long-term MS4 adaptive management
14 response under Condition S4.F.3. *Durbin Decl., ¶ 40; Terry Decl., Ex. A (2019 Phase I Permit,*
15 *App. 13); Terry Decl., Ex. E, p. 95 (Fact Sheet).* Ecology also updated Appendix 13 in the 2019
16 Permit. *Id.* Soundkeeper offers no specific facts to rebut the above evidence, presenting only

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18 ¹³ By way of example, the problem of impaired streams in the 303(d) list may be addressed through the TMDL
19 clean-up requirements in Condition S7. *Terry Decl., Ex. A, pp. 43-44 (Phase I Permit Condition S7).* Condition
20 S4.F.3.e expressly states that a TMDL or other enforceable water quality plan that addresses the MS4's contribution
21 to the water quality standards violation supersedes and terminates the S4.F.3's adaptive management response.
Durbin Decl., ¶¶ 45-46. Thus, Soundkeeper's reliance on the fact of 303(d) listed streams alone does not support its
claim that Condition S4 fails to ensure the permits do not cause or contribute to violations of water quality
standards. To the extent Soundkeeper is claiming that only Condition S4 must solve the complex problems of
impaired streams and salmon pre-spawn mortality, it is contrary to the programmatic nature of municipal stormwater
permits.

1 broad arguments that Condition S4 has not been applied to address the general, ongoing water
2 quality impairments, including salmon pre-spawn mortality issues.

3 In sum, as an adaptive management process that uses an iterative approach, Condition
4 S4.F remains a valid exercise of Ecology's discretion to define manner, method, and timing, to
5 secure compliance with water quality standards. *2008 Final Order Condition S4, p. 40, COL 16.*
6 And on this record, there is no showing that Ecology's exercise of that discretion was unlawful,
7 especially in light of the deference that the Board accords to Ecology's expertise in administering
8 water quality laws in the complex endeavor of regulating municipal stormwater. *Port of Seattle,*
9 *151 Wn.2d at 593-94; City of Woodinville, PCHB No. 15-013, p. 24.* Soundkeeper therefore is
10 not entitled to summary judgment on its claim in Issues 14 and 18 that Condition S4 as a matter
11 of law violates water quality standards. Ecology and Intervenor-Respondents are entitled to
12 summary judgment on the same Issues.

13 4. Compliance with MEP/AKART (Issues 15, 19)

14 Issues 15 and 19 asks, respectively, whether Phase I Permit and Phase II Permit
15 Condition S.4's adaptive management provisions allow the discharge of pollutants that have not
16 been treated with AKART and/or that fail to reduce the discharge of pollutants to the MEP.
17 Ecology and Intervenor-Respondents move for summary judgment on Issues 15 and 19, which
18 Soundkeeper opposes.

19 Ecology and Intervenor-Respondents argue that the language of Condition S4 itself
20 incorporates AKART/MEP as the standard that a permittee's adaptive management response
21 must meet. They also argue that given the purpose and operation of Condition S4 within the

1 programmatic Permits designed to address the unique challenges of regulating pollutants in
2 municipal stormwater, Ecology's evaluation of the Permits, as whole, for AKART/MEP
3 compliance appropriately addresses Condition S4's compliance with those standards.¹⁴ The
4 Board agrees with Ecology and Intervenor-Respondents.

5 Condition S4 expressly requires Permittees to reduce the discharge of pollutants to the
6 MEP and to use AKART to prevent and control water pollution. *Terry Decl., Ex. A, p. 4 (Phase*
7 *I Permit Conditions S4.C., S4.D).* And when Condition S4.F's adaptive management response is
8 triggered, and Ecology determines that a permittee's contribution to a water quality standard
9 violation will not be addressed through other Permit requirements or TMDL clean-up plans, the
10 required response of implementing BMPs is pegged to meeting the AKART standard. *Id., p. 5*
11 *(Phase I Permit Conditions S4.F.3.b, S4.F.3.d)* (Ecology will review permittee's potential BMPs
12 to meet AKART on a site-specific basis).

13 Because the Permits are programmatic and contain many conditions and requirements
14 that individually contribute to controlling municipal stormwater discharges, Ecology evaluated
15 whether the Permits, as a whole, met the MEP standard under the CWA and the AKART
16 standard under state law. *Killelea Decl., ¶¶ 3-4.* There is no legal requirement to perform a
17 separate analysis for each permit condition or element in order for Ecology to establish
18 AKART/MEP compliance for programmatic permits, and Soundkeeper's arguments to the
19 contrary are unpersuasive. As stated, municipal stormwater permits are programmatic ones in
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21 ¹⁴ Soundkeeper agrees that evaluation of this issue raises only questions of law appropriate for summary judgment.
Soundkeeper Combined Response/Reply at 11.

1 that they rely on a number of components that work together to control MS4 discharges. Thus, it
2 is reasonable and logical for Ecology to assess whether the totality of the Permits, rather than a
3 discrete component, meets the AKART/MEP standards. Ecology concluded that the Permits as a
4 whole met AKART/MEP, even though Condition S4 remained unchanged, based on its
5 evaluation of condition S5 and other new or stricter requirements of the Permits. *See, Barney*
6 *Decl., Ex. A, p. 47; Barney Decl., Ex. B, p. 38* (Fact Sheet noting that Condition S5.B requires
7 the SWMP to meet MEP/AKART requirements); *Killelea Decl., ¶¶ 4-6*. These new or stricter
8 requirements include:

- 9 • A new comprehensive stormwater planning requirement in Phase I Permit Condition
10 S5.C.6 and in Phase II Permit Condition S5.C.1, *Terry Decl., Ex. E, pp. 38-46*,
11 including developing SMAP discussed earlier to identify retrofits, preferred locations,
12 and land management strategies to better integrate stormwater management into the
13 municipalities' long range plans. *Id., p. 45; Barney Decl. Ex. C (SMAP Guidance);*
14 *Dinicola Decl., ¶ 7*.
- 15 • Revisions to Phase I Permit Condition S5.C.7 requiring permittees to implement
16 structural retrofits to their stormwater systems using a point system that introduces a
17 greater level of accountability and a defined level of effort for compliance with the
18 condition. *Barney Decl. Ex. B, pp. 61-66; Killelea Decl., ¶ 6*.
- 19 • A new requirement in the Phase II Permit that permittees implement a source control
20 program for existing development, including a new business inspection program that
21 has been successful in Phase I jurisdictions. *Barney Decl., Ex. B, pp. 59-61*.

- Strengthened requirements in both Permits on mapping, public education and outreach, and illicit discharge detection and elimination. *Killelea Decl.*, ¶ 6.

In sum, the Permits as a whole implement the MEP and AKART standards, notwithstanding the fact that Condition S4 remained unchanged from the previous Permits.

Soundkeeper relies on the same arguments leveled for Issues 14 and 18 to assert that Ecology's position in determining that the Permits as a whole complied with MEP/AKART standards is contrary to WAC 173-201A-510, 40 C.F.R. § 122.44(d), and *Dairy Fed'n*. But as discussed, 40 C.F.R. § 122.44(d) does not apply to municipal stormwater discharges, and neither WAC 173-201A-510 nor 40 C.F.R. § 122.44(d) require a separate AKART/MEP analysis for each permit condition or element in these programmatic Permits. And *Dairy Fed'n* does not control as it did not involve municipal stormwater discharges uniquely regulated by these programmatic Permits.

In sum, Soundkeeper failed to put forth evidence or legal argument on Issues 14, 15, 18, and 19 that would call for a departure from the Board's prior decisions on Condition S4. Condition S4.F in the 2007 Permits was extensively litigated, and the modifications that the Board made to the condition after the hearing were carried forward to later permit iterations essentially unchanged. The legal issues challenging Condition S4.F in the 2007 Permits is substantively the same as Issues 14, 15, 18, and 19 in the instant case. *See, 2008 Final Order Condition S4, p. 5.*¹⁵ The Board has already ruled that Condition S4.F is a valid compliance

¹⁵ Legal issues 4, 5, and 7, set out below, were resolved after the hearing on Condition S4 in the 2007 Permits:

1 pathway that, operating together with other permit requirements, meet AKART and MEP
2 standards and adequately protects water quality. The Board's ruling remains valid despite the
3 intervening years as the nature of stormwater pollution and the challenges for municipalities to
4 prevent and reduce it remain basically the same. The Board therefore denies Soundkeeper's
5 motion for summary judgment on Issues 14 and 18, and grants summary judgment in favor of
6 Ecology and Intervenor-Respondents on Issues 14, 15, 18, and 19.¹⁶

7 Based on the foregoing, the Board enters the following

8 **IV. ORDER**

9 The Pollution Control Hearings Board (Board) DENIES Intervenor-Respondents' Motion
10 to Strike Improper Opinion Testimony in Declarations Submitted in Support of Puget
11 Soundkeeper Alliance's Motion for Summary Judgment, as described in this decision.

12 The Board DENIES Puget Soundkeeper Alliance's Motion for Summary Judgment on
13 Issues 14 and 18, and GRANTS Department of Ecology's Cross-Motion [for Summary
14 Judgment] on Issues 12, 13, 14, 15, 18, and 19. The Board also GRANTS Intervenor-
15 Respondents' Cross-Motion for Summary Judgment on Issues 12, 13, 14, 15, 18, and 19.

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- 17 4. Does the permit unlawfully exempt permittees that comply with the process established in Permit
18 Condition S4.F from the requirement to ensure that discharges do not cause or contribute to violations of
19 water quality standards?
5. Does the process established in Permit Condition S4.F unlawfully fail to include standards and/or
timelines necessary to ensure that discharges will comply with water quality standards?
7. Does Permit Condition S4 unlawfully fail to prohibit violations of water quality standards?

20 2008 Final Order Condition S4, pp. 5-6.

21 ¹⁶ Given the foregoing resolution of Issues 14, 15, 18, and 19, the Board need not address Intervenor-Respondents' alternative argument that Soundkeeper is collaterally estopped from challenging Condition S4.

1 As no Issues remain for hearing, the case is DISMISSED.

2 SO ORDERED this 18th day of March, 2022.

3 **POLLUTION CONTROL HEARINGS BOARD**

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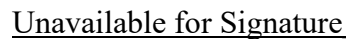
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CAROLINA SUN-WIDROW, Presiding Member

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NEIL L. WISE, Chair

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MICHELLE GONZALEZ, Member¹⁷

10 ¹⁷ Board Member Gonzalez participated in the deliberation on the motions and agrees with the decision, but was
11 unavailable for signature. Board decisions are effective upon being signed by two or more Board members. RCW
12 43.21B.100; WAC 371-08-330(2).
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